INDEX

CITATIONS

865121—49——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 178

J. BAKER BRYAN, SR., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the Court of Appeals, on reversal and remand for a new trial (R. 224–234) and on denial of petitioner's motion to amend the judgment (R. 236–237), are reported at 175 F. 2d 223 and 229.

JURISDICTION

The judgment of the Court of Appeals, reversing and remanding for a new trial, was entered on May 13, 1949 (R. 235), and the order denying petitioner's motion to amend the judgment was

entered on June 10, 1949 (R. 238). The petition for a writ of certiorari was filed on July 8, 1949, and was granted on October 10, 1949 (R. 239). The jurisdiction of this Court rests on 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the action of the court below in remanding for a new trial upon reversing petitioner's conviction violates petitioner's constitutional right not to be twice placed in jeopardy for the same offense.

2. Whether the court below, in reversing for insufficiency of the evidence to warrant submission of the case to the jury, had authority to remand for a new trial instead of directing the entry of a judgment of acquittal.

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

Constitution of the United States, Fifth Amendment:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

28 U. S. C.:

> § 2106. *Determination.*
>
> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully

brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Federal Rules of Criminal Procedure:

Rule 1. *Scope.* These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 29. *Motion for Acquittal.*

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the

motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 54. *Application and Exception.*

(a) *Courts and Commissioners.*

(1) *Courts.* These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit courts of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

* * * * *

STATEMENT

Petitioner was tried in the United States District Court for the Southern District of Florida on a four-count indictment charging that he wilfully attempted to evade income taxes in the years 1941, 1942, 1943 and 1944, respectively (R. 1–3). He was convicted on counts three and four (R. 20, 217), covering the years 1943 and 1944, and was sentenced to imprisonment for two years on count three and to pay a fine of $10,000 on count four (R. 218–219).

During the trial, petitioner moved for a judgment of acquittal at the close of the Government's case for alleged insufficiency of the evidence (R. 200–201). The motion was denied (R. 201) and renewed at the close of the entire case (R. 206), when it was again denied (R. 206). Following the verdicts of guilty on counts three and four (R. 20), petitioner filed a motion for acquittal and in the alternative for a new trial (R. 11–13), based on the alleged insufficiency of the evidence and other asserted trial errors. The motion was denied[1] (R. 14–15).

On appeal, the Court of Appeals for the Fifth Circuit reversed the conviction for insufficiency

[1] At the same time, the trial court denied petitioner's motion in arrest of judgment (R. 14) based, *inter alia*, on the fact that one of the jurors had been improperly excused before verdict, by consent of counsel and the court during the trial, without written stipulation as required by Rule 23 (b) of the Federal Rules of Criminal Procedure.

865121—49——2

of the evidence (R. 224–231) and remanded for a new trial (R. 231, 235). The case had been tried on the "net worth-expenditures" theory of proof by the introduction of evidence designed to prove that petitioner's expenditures during the pertinent years exceeded his declared available cash resources, including his reported business income. The Court of Appeals agreed that the evidence showed that petitioner's expenditures in 1943 and 1944 were considerably more than his reported incomes for those years (R. 226) but, against the vigorous dissent of one judge (R. 231–234), held that the evidence was insufficient to make out a *prima facie* case on the "net worth-expenditures" theory of proof because the evidence did not exclude the hypothesis that the funds used in making some of the expenditures might have been funds accumulated in prior years (R. 231). The court, "thinking the defect in the evidence might be supplied on another trial directed that it be had" (R. 236).

Petitioner subsequently filed a motion in the Court of Appeals to amend the judgment of that court to direct the entry of a judgment of acquittal, asserting, as ground therefor, that the court was without authority to remand for a new trial (R. 236). The Court of Appeals denied the motion (R. 237–238) and it is the propriety of its

action in remanding for a new trial which is now before this Court.[2]

SUMMARY OF ARGUMENT

I

The rule is well established by decisions of this Court that where the accused successfully seeks review of a conviction there is no double jeopardy upon a new trial. This is usually put upon the ground that the defendant, by appealing, waives his right to claim once-in-jeopardy upon a new trial in the same case. Contrary to petitioner's contention, the advent of the Federal Rules of Criminal Procedure does not change the application of the rule here. Rule 29 authorizes the entry of judgment of acquittal after verdict, but petitioner cannot claim double jeopardy on the ground that he has insisted on a judgment of acquittal rather than waived it. The appeal itself constitutes the waiver and this Court has held that a defendant does not have the right to limit his waiver. That petitioner is in a less favorable position than he would have been had

[2] The Government considered the evidence sufficient to sustain the verdict but did not petition for a writ of certiorari. One reason was that the case was submitted to a jury of eleven without full compliance with the requirement of Rule 23 (b) of the Federal Rules of Criminal Procedure. See n. 1, *supra*, p. 5. This point was raised on the appeal (R. 219) but was not reached (R. 231).

the trial court taken the case from the jury is not a factor peculiar to this case; this Court has, in similar circumstances, denied the claim of double jeopardy.

II

There is no merit in petitioner's contention that the court below was required to direct the entry of judgment of acquittal instead of remanding for a new trial. 28 U. S. C., Section 2106, authorized the court to remand the case and direct the entry of such appropriate judgment or to require such further proceedings to be had as were just under the circumstances. This section, which became effective September 1, 1948, represents no change in the power of the appellate courts on review, for they assuredly have never been authorized to remand and direct the entry of a judgment or require a further proceeding which was not "just" and "appropriate." Until recently, the appellate courts have consistently followed the practice of remanding for a new trial upon reversing for insufficiency of the evidence. Indeed, the appellate courts either did not have or did not exercise the power to direct the entry of judgment of acquittal.

In view of the long-standing practice of remanding for a new trial, it must be concluded that a remand for a new trial is "just" and "appropriate" and therefore authorized by 28 U. S. C.,

Section 2106, unless petitioner is correct in contending that Rule 29 of the Federal Rules of Criminal Procedure abrogates that power. Rule 29 does not do so. It merely constitutes a direction to the District Courts and revises prior procedure only to the extent of substituting a motion for judgment of acquittal in place of the former directed verdict and of permitting the District Courts to enter judgment of acquittal *after* verdict, a practice which had not been generally adopted prior to the rules and which had been of doubtful propriety. While the rule also appears to have the implied effect of authorizing the appellate courts to direct the entry of judgment of acquittal upon reversal if such a judgment is "just" and "appropriate" within the meaning of 28 U. S. C., Section 2106, the rule does not abrogate the power of the District Courts to grant a new trial for insufficiency of the evidence and therefore necessarily does not abrogate the power of the appellate courts to remand for a new trial upon reversing for insufficiency of the evidence.

The remand for a new trial in this case was not only therefore authorized by 28 U. S. C., Section 2106, but was the only judgment which the court below could properly have entered. Since remand for a new trial for insufficiency of the evidence has long been just and appropriate in any criminal case, it would appear that appellate

courts may appropriately direct the entry of judgment of acquittal only in an exceptional case, as where the record plainly shows, or the Government concedes, that no additional evidence is available. Certainly, when additional evidence is available, as here, no persuasive argument can be made that the Government should be foreclosed by an appellate court from establishing its case against a defendant whose guilt, even on what the appellate court deems to be insufficient evidence, was apparent enough for a jury to convict him. In the instant case, the majority thought "the defect in the evidence might be supplied on another trial" and the dissenting judge stated that the evidence of petitioner's guilt was overwhelming. It would therefore have been inappropriate and unjust from the standpoint of the fair administration of criminal justice for the court below to have entered judgment of acquittal and thereby set petitioner free and bar the Government from establishing its case against him.

ARGUMENT

I

THE ACTION OF THE COURT BELOW IN REMANDING FOR A NEW TRIAL UPON REVERSING PETITIONER'S CONVICTION DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT NOT TO BE TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE

The action of the court below in remanding for a new trial resulted from the court's reversal of

petitioner's conviction—a reversal which petitioner himself procured by appealing from the judgment of conviction against him. As this Court long ago stated in *Trono* v. *United States,* 199 U. S. 521, 533–534:

> When the first trial is entered upon he [the defendant] is then put in jeopardy within the meaning of the phrase, and yet it has been held, as late as *United States* v. *Ball,* 163 U. S. 662, 671 (and nobody now doubts it), that if the judgment of conviction be reversed on his own appeal, he cannot avail himself of the once-in-jeopardy provision as a bar to a new trial of the offense of which he was convicted. And this is generally put upon the ground that by appeal he waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted, that he will be again tried for the offense of which he has been once convicted. * * *

See also, *United States* v. *Ball,* 163 U. S. 662, 671–672; *Brantley* v. *Georgia,* 217 U. S. 284; *Stroud* v. *United States,* 251 U. S. 15; *Hill* v. *Texas,* 316 U. S. 400, 406; *Francis* v. *Resweber,* 329 U. S. 459, 462. No distinction has ever been drawn between the application of this rule to reversals for insufficiency of the evidence and to reversals for other reasons. Indeed, it has long been a consistent and accepted practice of the appellate courts to remand for a new trial

upon reversing a conviction for insufficiency of the evidence. (See *infra*, pp. 17–20.)

Petitioner recognizes the authority of the above-mentioned decisions but asserts that they are "distinguishable by the advent of the Federal Rules of Criminal Procedure" (Br. 17). He argues that a new trial will place him in jeopardy a second time for the same offense because (1) neither the District Court nor the court below had discretion to disregard their "mandatory duty" to acquit him or to deprive him of his "absolute right" to acquittal (Br. 19) and (2) he has insisted upon his right to acquittal, rather than waived it (Br. 21–22).

Actually, these arguments raise no question of substance as to double jeopardy. They are based for the most part, and perhaps wholly, upon petitioner's contention that the court below had no power to remand for a new trial. For petitioner says that the Federal Rules of Criminal Procedure have worked a change in the power of the appellate court: while, before the Rules, an appellate court could do nothing but order a new trial, "it can now require the judgment of acquittal to which petitioner became entitled" (Br. 20). It follows, petitioner says, that while an appeal which, before the Federal Rules, could only eventuate in a new trial might be deemed a waiver of the right to an acquittal, an appeal under the Federal Rules, taken to vindicate the

right to an acquittal, cannot be treated as a waiver of that right. But the necessary premise for petitioner's conclusion is that under the Rules the appellate court must direct an acquittal. If petitioner is correct in this, no question of double jeopardy is reached.

If petitioner means to argue that he did not waive his right against double jeopardy even if the court below did have power to remand for a new trial, then the argument is answered by the decisions cited above. By appealing, petitioner necessarily invoked the jurisdiction of the court below to enter judgment upon reversal and he cannot be heard to say that he invoked the power of the court only to direct the entry of a judgment of acquittal. It is the appeal itself which constitutes the waiver of jeopardy and, as this Court specifically stated in *Trono* v. *United States*, 199 U. S. 521, a defendant does not have the right to limit his waiver as to jeopardy when

865121—49——3

he appeals from a judgment against him. In that case it was held that, after acquittal of murder in the first degree and conviction and reversal of the conviction of assault, the defendant could be tried for murder in the second degree. Except for appealing from his conviction of the lesser offense, the defendant had taken no action which could be construed as a waiver of double jeopardy as to the higher offense. Nevertheless, it was held that the reversal of a judgment of conviction on the defendant's own appeal not only bars him from pleading once-in-jeopardy as a bar to a new trial of the offense of which he was convicted but also bars him from pleading once-in-jeopardy as to that part of the judgment which acquitted him.[3] It no more advances petitioner's case here than it did in *Trono* that, had the trial judge acted correctly in the first instance, petitioner would be better off than he now is.[4] Here, as there, the trial court's error and the necessity for appeal put petitioner in a worse position. But that detriment is not constitutionally objectionable. The pertinent rule is simply that, as the Court succinctly stated in *Francis* v. *Res-*

[3] However, a defendant who is acquitted and does not appeal may not be tried again for the same offense. *United States* v. *Ball*, 163 U. S. 662; *Kepner* v. *United States*, 195 U. S. 100.

[4] That is to say, with respect to the *Trono* case, if the lower court had acquitted the defendants of assault as the appellate court thought proper, and also acquitted the defendants of first degree murder, as the trial court had.

weber, 329 U. S. 459, 462, "where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial." As a corollary, jeopardy in the same case is forbidden only if the new trial is at the instance of the Government. *Palko* v. *Connecticut,* 302 U. S. 319, 322–323; *Kepner* v. *United States,* 195 U. S. 100.

II

THE COURT BELOW HAD POWER TO REMAND FOR A NEW TRIAL INSTEAD OF DIRECTING THE ENTRY OF A JUDGMENT OF ACQUITTAL

Petitioner contends that the court below had no power to remand for a new trial upon reversing his conviction for insufficiency of the evidence and was required to direct the entry of a judgment of acquittal (Br. 7–16). The contention is based upon an argument that Rule 29 (a) of the Federal Rules of Criminal Procedure (*supra,* pp. 3–4) imposed a mandatory duty upon the trial court to enter judgment of acquittal for insufficiency of the evidence and that the court below, upon holding the evidence insufficient to sustain petitioner's conviction, is required to do what the trial court should have done. In effect, petitioner is urging that the long accepted power of an appellate court to remand for a new trial has now been nullified by Rule 29 as to reversals for insufficiency of the evidence. It seems clear, however, that no such result was intended or effected

by the rule and that, on the contrary, the remand for a new trial was just and appropriate and thus authorized under the broad discretionary power conferred on the appellate courts by 28 U. S. C., Section 2106 (*supra*, pp. 2–3).

A. THE REMAND FOR A NEW TRIAL WAS A "JUST" AND "APPROPRIATE" JUDGMENT AND THEREFORE AUTHORIZED BY 28 U. S. C., SECTION 2106, UNLESS THE POWER OF THE APPELLATE COURTS THEREUNDER HAS BEEN ABROGATED BY RULE 29 OF THE FEEDRAL RULES OF CRIMINAL PROCEDURE

28 U. S. C., Section 2106 (*supra*, pp. 2–3), which became effective September 1, 1948 (Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., Sec. 38), provides that this Court and any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and—

> may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

This section is based upon three previous sections of Title 28 of the United States Code (Revisers' Notes, Section 2106, H. Rep. No. 308, 80th Cong., 1st Sess., p. A173), one of which had been in effect since the Circuit Courts of Appeals were established in 1891 and which contained a general direction to the appellate courts on review and

determination of cases. That section—Section 10 of the Act of March 3, 1891 (c. 517, 26 Stat. 829), formerly 28 U. S. C., Section 877—provided in effect that when a cause should be reviewed and determined by this Court or by a Court of Appeals "such cause shall be remanded" to the lower court "for further proceedings to be there taken in pursuance of such determination." The revisers' notes to 28 U. S. C., Section 2106, do not indicate that this general direction to the appellate courts was intended to be changed in any substantial respect by the change of phraseology in 28 U. S. C., Section 2106. Assuredly, in reviewing a decision of a lower court, an appellate court has never been authorized to enter or direct the entry of a judgment which was not "just" and "appropriate."

There can be no doubt that, at least prior to the promulgation of the Federal Rules of Criminal Procedure, it was "just" and "appropriate" for an appellate court to remand for a new trial upon reversing a conviction for insufficiency of the evidence. A remand was "just", since it did not offend against the constitutional prohibition against double jeopardy. (*Supra*, pp. 10–15.) A remand was also "appropriate" even though the reversal for insufficiency of the evidence necessarily meant that the trial court should have directed a verdict for the defend-

ant.* Thus, in *Wiborg* v. *United States*, 163 U. S. 632, and again in *Clyatt* v. *United States*, 197 U. S. 207, this Court remanded for a new trial after holding that the evidence was insufficient to support the defendant's conviction. With recent exceptions, the several Courts of Appeals have quite consistently followed the same practice, at times specifically stating that the trial court should have directed a verdict for the defendant. See, e. g., *United States* v. *Di Genova*, 134 F. 2d 466 (C. A. 3d); *United States* v. *Russo*, 123 F. 2d 420 (C. A. 3d); *Pines* v. *United States*, 123 F. 2d 825 (C. A. 8th); *Backun* v. *United States*, 112 F. 2d 635 (C. A. 4th); *Caringella* v. *United States*, 78 F. 2d 563 (C. A. 7th);

* Before, as now under Rule 29 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 3), the trial court was supposed to direct a verdict for the defendant if the evidence was insufficient to sustain a conviction. See, e. g., *Wiborg* v. *United States*, 163 U. S. 632, 659; *Hammond* v. *United States*, 127 F. 2d 752 (C. A. D. C.); *United States* v. *Di Genova*, 134 F. 2d 466 (C. A. 3d). Thus, the defendant could contend in the appellate court that "there is no substantial evidence in the record to support the judgment upon the verdict of guilty and that the motion of the defendants for an instructed verdict in their favor was erroneously denied" (*Abrams* v. *United States*, 250 U. S. 616, 619), in which event (*ibid.*)—

> A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict.

Necessarily, therefore, a holding by the appellate court that the evidence was insufficient to sustain the conviction meant that the trial court should have directed a verdict for the defendant.

Enrique Rivera v. *United States*, 57 F. 2d 816 (C. A. 1st); *Collenger* v. *United States*, 50 F. 2d 345 (C. A. 7th), certiorari denied, 284 U. S. 654; *Leslie* v. *United States*, 43 F. 2d 288 (C. A. 10th); *Buhler* v. *United States*, 33 F. 2d 382 (C. A. 9th); *Ridenour* v. *United States*, 14 F. 2d 888 (C. A. 3d); *Yusem* v. *United States*, 8 F. 2d 6 (C. A. 3d); *Holmes* v. *United States*, 275 Fed. 49 (C. A. 4th); *Scoggins* v. *United States*, 255 Fed. 825 (C. A. 8th); *Duff* v. *United States*, 185 Fed. 101 (C. A. 4th).

These instances of remand for a new trial were not exceptional; on the contrary, up to comparatively recently, it has been assumed for the most part that the federal appellate courts had no power to direct the entry of a judgment of acquittal or discharge the defendant. Generally speaking, the rule has been that a reversal leaves the Government free to retry the case or to dismiss it if no additional evidence of the defendant's guilt is obtainable, as the Court of Appeals for the Seventh Circuit stated in *Caringella* v. *United States*, 78 F. 2d 563, 567.* Only occasionally did

*This was true even though the appellate court did not expressly remand for a new trial. A new trial could be had upon a mere reversal when the mandate of the appellate court directed that such proceedings be had, in conformity with the judgment of the court, as according to right and justice and the laws of the United States ought to be had. 9 Cycl., Federal Procedure (1943), Sec. 4673; *Kosak* v. *United States*, 54 F. 2d 72 (C. A. 3d); *Steinman* v. *United States*, 185 Fed. 47 (C. A. 3d) cf. *Stroud* v. *United States*, 251 U. S. 15, 17.

the appellate courts direct the discharge of the defendant or dismiss the indictment and, in some of these cases, there were special circumstances which appeared to make such order appropriate.[7]

The general rule that a new trial could be ordered or had after a reversal for insufficiency of the evidence appears to have resulted from a consideration of the power of the trial courts after verdict. Even before the Federal Rules, the trial courts had statutory power to grant a new

[7] In *United States* v. *Bonanzi*, 94 F. 2d 570 (C. A. 2d), the Court of Appeals reversed and ordered the indictment dismissed where the evidence exclusive of illegally obtained evidence was insufficient to sustain the convictions. In a similar situation in *Klee* v. *United States*, 53 F. 2d 58 (C. A. 9th), the Court of Appeals ordered that the defendants be discharged. In *France* v. *United States*, 164 U. S. 676, this Court reversed and ordered the discharge of the defendants, but that case involved the construction of the statute under which the defendants were convicted and it was held that the evidence did not bring the defendants within the statute. In *Romano* v. *United States*, 9 F. 2d 522 (C. A. 2d), the court held the evidence insufficient and reversed with directions to dismiss the indictment. In *Cemonte* v. *United States*, 89 F. 2d 362 (C. A. 6th), where the evidence was also held to be insufficient, the court ordered the discharge of the defendant. In *United States* v. *Tatcher*, 131 F. 2d 1002, (C. A. 3d), the court reversed for insufficiency of the evidence and directed that the defendant be discharged. However, the Court of Appeals had previously found the evidence insufficient to support the defendant's conviction and had remanded for a new trial; on the second trial the defendant demurred to the evidence, the Government joined in the demurrer, the trial court discharged the jury, overruled the demurrer and found the defendant guilty; and the Court of Appeals, in finding the evidence insufficient and reversing

trial.[8] But they either did not have or did not generally exercise the power to enter a judgment of acquittal after verdict.[9] In civil cases, where the parties may move for judgment notwithstanding the verdict and there is common law precedent for the reservation by the trial court of his decision on a motion for a directed verdict, this Court has held that the courts of appeals have jurisdiction to reverse and remand for a new trial but

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with directions to discharge the defendant, stated that it was following the common law practice in such a situation although it was not required to do so. In the previous case—*Tatcher* v. *United States*, 107 F. 2d 316 (C. A. 3d)—there was a demurrer to the evidence which was treated as a motion for a directed verdict and the Court of Appeals stated that it was bound to consider the judgment as having been entered upon the verdict of the jury. In that situation, the court stated that upon reversal for insufficiency of the evidence it could not adjudge the defendant not guilty but was required to direct a new trial.

[8] R. S. 726 (Act of Sept. 24, 1789, c. 20, sec. 17, 1 Stat. 83); reenacted as Section 269 of the Judicial Code (Act of March 3, 1911, c. 231, sec. 269, 36 Stat. 1163), formerly 28 U. S. C., Sec. 391, which was repealed by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess. The granting of a new trial is now authorized by Rule 33 of the Federal Rules of Criminal Procedure (following 18 U. S. C., Sec. 687).

[9] The question of the trial courts' power in criminal cases was before the Court in *United States* v. *Stone*, 308 U. S. 519, where there was an affirmance of the decision below (101 F. 2d 870 (C. A. 7th)) by an equally divided court. The Government contended that the trial court had no power in any event to enter a judgment of acquittal after verdict (see our brief, No. 48, October Term, 1939) but the facts were such that it might have been concluded that the trial court had reserved decision on the motions for directed verdicts.

are without power, consistently with the Seventh Amendment, to direct judgment notwithstanding the verdict in the absence of a proper motion in the trial court for such judgment or a reservation by the trial court of his decision on motion for a directed verdict.[10] *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Baltimore & C. Line* v. *Redman*, 295 U. S. 654; *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389. The appellate courts' power after verdict is therefore no greater than the trial courts'. By analogy to the civil cases, the appellate courts in criminal cases have found themselves powerless to direct the entry of judgment of acquittal after verdict at least in the absence of a motion for such judgment after verdict or a reservation by the trial court of his decision on the motion for a directed verdict. Thus, in *Collenger* v. *United States*, 50 F. 2d 345 (C. A. 7th), certiorari denied, 284 U. S. 654, where the evidence was held insufficient to support the convictions and the defendants insisted that they be discharged because a verdict for their acquittal should have been directed by the trial court, it was held that this Court's decision in *Slocum* v. *New York Life Ins. Co.*, *supra*, required the direction of a new trial. And see cases cited, *supra*, this page.

[10] The reservation of decision on the motion for a directed verdict in civil cases is now automatic under Rule 50 (b) of the Federal Rules of Civil Procedure (following 28 U. S. C., Sec. 723 (c)).

Under Rule 29 of the Federal Rules of Criminal Procedure (*supra*, pp. 3–4) the trial courts may now enter judgment of acquittal after verdict, at least on motion, and, accordingly, the appellate courts would seem to have power to direct the entry of a judgment of acquittal when such motion is made after verdict and provided such a judgment is "just" and "appropriate" so as to be authorized by 28 U. S. C., Section 2106. The question when such a judgment would be just and appropriate is discussed *infra*, pages 37–42.

At this point it is sufficient that the appellate practice of remanding for a new trial has in the past been regarded as both "just" and "appropriate." It follows that the court below had authority under 28 U. S. C., Section 2106, to remand this case for a new trial, provided Rule 29 of the criminal rules does not abrogate that power by making a remand inappropriate upon a reversal for insufficiency of the evidence.

B. THE POWER OF THE COURT BELOW TO REMAND FOR A NEW TRIAL UNDER 28 U. S. C., SECTION 2106, IS NOT ABROGATED BY RULE 29 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Federal Rules of Criminal Procedure govern the procedure in criminal proceedings in the courts of the United States, including the Courts of Appeals and this Court (Rules 1 and 54, *supra*, pp. 3, 4). But Rule 29, *supra* (pp. 3–4) relates to procedure in the District Courts and does not

purport to state what a Court of Appeals may or must do on reversing a judgment of conviction for insufficiency of the evidence. Petitioner does not assert the contrary. His argument is that, since the court below held on appeal that the evidence was insufficient to sustain his conviction, the trial court should have entered a judgment of acquittal at the close of all the evidence as provided in Rule 29 (a) and that the court below must do what the trial court should have done. The argument rests on the premise that under Rule 29 (a) the right to a judgment of acquittal accrued to petitioner at the close of all the evidence in the trial court.

But if, as we shall show to be the case, no pertinent right accrued to petitioner under Rule 29 (a), *supra* (p. 3) which he did not have prior to the promulgation of the criminal rules, he is in no better position than the many defendants who were ordered to stand a second trial after reversal for insufficiency of evidence before the promulgation of the Federal Rules. See *supra*, pp. 18–20. The first sentence of paragraph (a) abolishes motions for directed verdict and substitutes motions for acquittal. The second sentence, upon which petitioner relies, provides:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is

closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

This, of course, is a direction which is to be exercised according to the judgment of the trial court as to the sufficiency of the evidence. Prior to the promulgation of the rules, it was the duty of a trial court to direct a verdict in favor of the defendant if the evidence was insufficient to sustain a conviction. (See n. 5, *supra*, p. 18.) Accordingly, the quoted sentence is merely a statement of what was previously the rule, except that the trial court is to order the entry of a judgment of acquittal instead of directing a verdict. The Notes of the Advisory Committee on Rules for Criminal Procedure (S. Doc. No. 175, 79th Cong., 2d Sess., p. 50) state that the change in nomenclature does not modify the nature of the motion or enlarge the scope of matters that may be considered, and, as to the second sentence quoted above, simply state that it was patterned on Section 410 of the New York Code of Criminal Procedure.[11] It is therefore evident that paragraph (a) was not designed to give a defendant any new substantive right. Cf. *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 250.

[11] Section 410 of the New York Code of Criminal Procedure provides:

> If at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction of one or more of the crimes in the indictment or information, it may advise the jury to acquit the defendant thereof and they must follow the advice.

Accordingly, paragraph (a) does not support petitioner's contention that the right to a judgment of acquittal accrued to him at the close of all the evidence and must be enforced by the court below on appeal through direction of the entry of a judgment of acquittal. Petitioner's right under paragraph (a) is to a judgment of acquittal *if in the judgment of the trial court* the evidence is insufficient to sustain a conviction. That right, except from the standpoint of form, is the same as the previous right to a directed verdict which, as we have already shown (*supra*, pp. 17–20), did not preclude the appellate courts from remanding for a new trial upon reversing a conviction for insufficiency of the evidence.

Petitioner must therefore necessarily rely upon paragraph (b) of Rule 29 for his contention that the rule abrogates the power of the appellate courts to remand for a new trial upon reversing a conviction for insufficiency of the evidence. That paragraph authorizes the trial courts to reserve decision until after verdict on the motion for judgment of acquittal made at the close of all the evidence and, in case of denial of the motion, permits the defendant to renew his motion within five days after the jury is discharged and to include in the alternative a

motion for a new trial. The paragraph further provides:

> If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

The Notes of the Advisory Committee on Rules for Criminal Procedure, *supra*, state that paragraph (b) is in substance similar to Rule 50 (b) of the Federal Rules of Civil Procedure (following 28 U. S. C., Sec. 723c) "and permits the court to render judgment for the defendant notwithstanding a verdict of guilty", that some federal courts have recognized and approved the use of a judgment *non obstante verdicto* for the defendant in a criminal case (citing *Ex parte United States*, 101 F. 2d 870 (C. A. 7th), affirmed by an equally divided court, *United States* v. *Stone*, 308 U. S. 519), and that "The rule sanctions this practice." The apparent purpose of paragraph (b), therefore, was merely to permit the trial courts to enter judgment of acquittal *after* verdict, a practice which had not been generally adopted prior to the rules and which had been of doubtful propriety.

Rule 29 (b) does not deprive the trial courts of any power which they previously could exercise after verdict. The rule recognizes the power

of the trial courts to grant a new trial by providing that on a motion made after verdict of guilty for judgment of acquittal or in the alternative for a new trial the trial court may "order a new trial or enter judgment of acquittal." Moreover, Rule 33 (following 18 U. S. C., Sec. 687) specifically authorizes the trial courts to grant a new trial.

The necessary conclusion is that after verdict the trial courts have power *either* to order a new trial or to enter judgment of acquittal *for insufficiency of the evidence.* Under Rule 33 a new trial may be granted for the usual reasons. One of those reasons is for insufficiency of the evidence to sustain the conviction. 9 Cycl., Federal Procedure (1943), Sec. 4499; Rapalje, *Criminal Procedure* (1889), Sec. 404; *United States* v. *Sorrentino,* 78 F. Supp. 425 (M. D. Pa.); *United States* v. *Robinson,* 71 F. Supp. 9 (D. D. C.); *United States* v. *Kaadt,* 31 F. Supp. 546 (N. D. Ind.). This is impliedly recognized by, and confirmed in, Rule 29, since that rule is concerned only with procedure with relation to the sufficiency of the evidence and provides that on a motion for judgment of acquittal or in the alternative for a new trial, the trial court may order a new trial or enter judgment of acquittal.[12]

[12] The granting of a new trial on grounds other than the insufficiency of the evidence is of course authorized by Rule 33. The rules also make provision for dismissal of the indictment or information. Rule 12 and 34.

The conclusion that after verdict the trial courts may either order a new trial or enter judgment of acquittal for insufficiency of the evidence is clear under decisions of this Court interpreting Rule 50 (b) of the Federal Rules of Civil Procedure (following 28 U. S. C., Sec. 723c). As already stated, the Notes of the Advisory Committee on Rules for Criminal Procedure, *supra*, state that Rule 29 (b) of the criminal rules is "in substance" similar to Rule 50 (b) of the civil rules. In *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, a civil case, the Court had before it the question whether under Rule 50 (b) of the civil rules a Court of Appeals is precluded from directing the entry of judgment for the defendant in the absence of a motion in the trial court for judgment notwithstanding the verdict. The case was a suit for damages for trespass and the Court of Appeals had directed the entry of judgment for the defendant after holding that there was prejudicial error in the admission of evidence to prove legal title and that the evidence of possession was insufficient to go to the jury. This Court held that the Court of Appeals could only remand for a new trial in the absence of a motion in the trial court for judgment notwithstanding the verdict. One of the reasons for the holding was that the trial court had a discretion to choose between directing a verdict and granting a new

trial and that the determination of which course should be pursued calls for the judgment in the first instance of the trial court, which is not available when the defendant has made no motion in the trial court for judgment notwithstanding the verdict. The following language of the opinion (p. 215) is particularly pertinent here:

> Rule 50 (b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict *even though that court is persuaded that it erred in failing to direct a verdict for the losing party.* The rule provides that the trial court "may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." This "either-or" language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. *In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives.* * * * [Italics supplied.]

See also, *Berry* v. *United States,* 312 U. S. 450, 452–453; *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571.

There can of course be no "discretion to choose between the two alternatives" if a judgment not-

withstanding the verdict is required for insufficiency of the evidence and a new trial may be granted only for errors other than the denial of the motion for a directed verdict. It would therefore seem futile for petitioner to argue, as he does by reference to *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243 (Br. 8, 14–15), a civil case, that under Rule 29 (b) the trial courts may grant a new trial only for errors other than the denial of the motion for judgment of acquittal made at the close of all the evidence.[13] Like Rule 50 (b) of the civil rules, Rule 29 (b) of the criminal rules provides that after verdict the trial court may either order a new trial or enter judgment of acquittal and nothing in the rule prohibits the trial court from exercising his discretion as between the two courses when he concludes that he erred in his judgment as to the sufficiency of the evidence and should have entered a judgment of acquittal at the close of all the evidence.[14]

[13] Petitioner refers to the separate "offices" of the motion for judgment and the motion for a new trial as stated in *Montgomery Ward & Co.* v. *Duncan, supra* (Br. 8), but that decision recognized that the two motions overlap to some extent.

[14] The fact that the trial court may also grant a new trial if it believes the verdict is against the weight of the evidence (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 248), does not, as petitioner seems to suggest (Br. 8), militate against the power to grant a new trial for insufficiency of the evidence to sustain the conviction.

Rule 29 (b) therefore refutes petitioner's contention that the right to a judgment of acquittal accrued to him at the close of all the evidence and must be directed by the court below on its reversal of his conviction for insufficiency of the evidence. The right which accrued to petitioner under paragraph (a) at the close of all the evidence was not the absolute right to a judgment of acquittal but the right to a judgment of acquittal if in the opinion of the trial court such a judgment should be entered. On appeal, the court below held that the evidence was insufficient to support petitioner's conviction, and thus that the trial court had erred in denying the motion for judgment of acquittal made at the close of all the evidence. The error, however, was one which, had the trial court been aware of it, could have been corrected by the trial court itself after verdict of guilty by either the entry of a judgment of acquittal or order for a new trial, the choice of which was entirely within its discretion and not even subject to review on appeal. Had the trial court granted a new trial, petitioner could not have appealed on the ground that his motion for judgment of acquittal should have been granted and, indeed, would have had no cause for complaint that the trial court had awarded him a new trial on his motion therefor for reasons which included the alleged insufficiency of the evidence. Since after the verdict of guilty the

trial court had power either to order a new trial or enter a judgment of acquittal for insufficiency of the evidence, there is no basis for an argument that only one course—the direction of entry of judgment of acquittal—was open to the court below upon reversing petitioner's conviction.

In this connection, it is pertinent to take note of the power of an appellate court in reversing for insufficiency of the evidence in a *civil* case. In situations where it is or formerly was proper for the trial court to enter judgment notwithstanding the verdict, the appellate courts had and have power to direct the entry of such a judgment upon reversal (*Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 254; *Baltimore & C. Line* v. *Redman*, 295 U. S. 654) but were and are *not required* to do so (see *Stewart* v. *Southern Ry. Co.*, 315 U. S. 283; *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92; *Sammons* v. *Colonial Press*, 126 F. 2d 341, 349 (C. A. 1st)). Thus, for example, long ago in *St. Louis* v. *Western Union Telegraph Co.*, *supra*, the Court stated that in civil cases tried by the court rather than by jury, where all the facts are specifically found or agreed to, it is within the power of the appellate court, in reversing, to direct the judgment which shall be entered upon the findings, but that (p. 104)—

> At the same time if for any reasons justice seems to require it, the court may simply reverse and direct a new trial.

To summarize, Rule 29 of the Federal Rules of Criminal Procedure is a procedural direction to the District Courts which varies previous procedure only to the extent of changing the nomenclature of the former motion for a directed verdict and of authorizing a District Court to enter judgment of acquittal *after* verdict. While the rule also appears to have the implied effect of authorizing the appellate courts to direct the entry of judgment of acquittal upon a reversal for insufficiency of the evidence if such a judgment is just and appropriate, the rule does not abrogate either the power of the District Courts to grant a new trial for insufficiency of the evidence or the long accepted power of the appellate courts to remand for a new trial upon reversing for insufficiency of the evidence.

In several recent cases, courts of appeals have directed the entry of a judgment of acquittal upon reversing a conviction for insufficiency of the evidence, but these cases furnish no persuasive argument in support of petitioner's position that the court below was *required* to direct the entry of a judgment of acquittal. In the following three cases the Court of Appeals for the Third Circuit remanded for entry of judgment of acquittal upon reversing for insufficiency of the evidence: *United States* v. *Bozza,* 155 F. 2d 592, affirmed in part and reversed in part, 330 U. S.

160;[15] *United States* v. *Renee Ice Cream Co.*, 160 F. 2d 353; *United States* v. *Johnson*, 165 F. 2d 42, certiorari denied, 332 U. S. 852. The Court of Appeals' action in the *Bozza* case was stated to be based upon Rule 29 of the criminal rules and to be "just and practicable." The *Renee Ice Cream* decision simply states (160 F. 2d at 357–358):

> The conclusion we have reached is that the judgment must be reversed and the case remanded to the District Court with directions to enter a judgment of acquittal under Rule 29 (a) of Federal Rules of Criminal Procedure, relative to the Motion for Acquittal.

The *Johnson* decision states as follows (165 F. 2d at 50):

> As to appellant, Miller Johnson, for reasons above stated, there must be a remand with directions to enter judgment of acquittal.

These three decisions show that the Third Circuit is of the opinion that it has authority to, and perhaps also that it is required to, direct the entry of judgment of acquittal upon reversing for insufficiency of the evidence. The decisions do not, however, reflect any valid reason for such a requirement. In *United States* v. *Gardner*, 171 F. 2d 753, the Court of Appeals for

[15] In the *Bozza* case, the counts of the indictment on which the Court of Appeals reversed were not before this Court.

the Seventh Circuit reversed for insufficiency of the evidence and remanded with directions for the entry of a judgment of acquittal, but only stated that such procedure was authorized (not required) by the Federal Rules of Criminal Procedure.[16] On the other hand, in *Karn* v. *United States,* 158 F. 2d 568 (C. A. 9th), while the court did not state that direction for entry of a judgment of acquittal is required, it did state that the trial judge should have instructed the jury to render a verdict of acquittal and that "The right of appellant to a verdict of acquittal fully matured when he made his motion" (p. 573).

C. REMAND FOR A NEW TRIAL WAS NOT ONLY A "JUST" AND "APPROPRIATE" JUDGMENT, AND THUS AUTHORIZED BY 28 U. S. C., SECTION 2106, BUT WAS THE ONLY JUDGMENT WHICH THE COURT BELOW COULD PROPERLY HAVE ENTERED

Petitioner's contention that the court below was required to direct the entry of a judgment of acquittal would seem to be answered fully by the fact that Rule 29 does not abrogate the long-standing practice and power of the appellate courts to remand for a new trial in reversing for insufficiency of the evidence. A remand for a new trial in any criminal case for insufficiency

[16] *United States* v. *Jones,* 174 F. 2d 746 (C. A. 7th), is also relied upon by petitioner (Br. 13). In that case, it was stated that "There is a total failure of proof as to venue, and the motion 'for discharge' at the conclusion of all the evidence should have been sustained" (p. 749), but the court merely reversed the judgment of the District Court.

of the evidence has long been accepted as both "just" and "appropriate," as we have shown (*supra*, pp. 16–20), and is therefore necessarily authorized by 28 U. S. C., Section 2106.

However, since there now seems to be no room for denying that the appellate courts also have power to direct the entry of a judgment of acquittal whenever such a judgment is "just" and "appropriate" (cf. *Gibson* v. *United States*, 329 U. S. 338, 350–351), the question arises as to when, if ever, the direction of entry of judgment of acquittal, rather than remand for a new trial, is "just" and "appropriate." If the question is left to the discretion of the Courts of Appeals, some circuits may adopt the practice of directing the entry of judgment of acquittal in all criminal cases reversed for insufficiency of the evidence, as the Third and Ninth Circuits appear already to have done, and the practice in the several circuits may vary. It is accordingly desirable that this Court state a rule for the guidance of the Courts of Appeals in this connection.

Since remand for a new trial has long been accepted as a just and appropriate judgment in *any* criminal case reversed for insufficiency of the evidence, it would appear that a direction for entry of judgment of acquittal would be a just and appropriate judgment only in an exceptional case. There is no compelling reason for a termination of a criminal case by judgment for the

defendant after a jury has once found the defendant guilty. In a civil case, where, unlike a criminal case, there is an appeal from the granting of a directed verdict, judgment on appeal can be given the party entitled to it upon evidence which as a whole establishes something so clearly as to leave no room to doubt what the fact is. Cf. *Gunning* v. *Cooley*, 281 U. S. 90, 94. A criminal case, on the other hand, is concerned with a determination of the defendant's guilt, and a reversal for insufficiency of the evidence after the trial court has denied judgment of acquittal and the jury has returned a verdict of guilty can hardly be taken to establish the innocence of the defendant. The interests of society demand that criminals be punished and the fair administration of justice requires that the Government have an opportunity to retry a defendant if evidence is available to supply the deficiency upon which the appellate court's reversal is based.

We submit, therefore, that the appellate courts should direct the entry of judgment of acquittal only in cases where it appears from the record, or the Government concedes, that no other evidence is available on a new trial.[17] That or a similar practice has been followed by many state courts having power to remand for a new trial or discharge the defendant.[18] The same result is of

[17] In the instant case, the Government does have additional evidence which can be introduced on a new trial.

[18] See *e. g.*, Alabama: *Robison* v. *State*, 30 Ala. App. 12, certiorari denied, 240 Ala. 638; *Berry* v. *State*, 29 Ala. App.

course obtained by the present practice under which, upon reversal for insufficiency of the evidence, whether or not accompanied by an express remand for a new trial, the Government has an opportunity to retry the defendant but normally *nolle prosses* the indictment if no additional evidence is available for another trial. In the final analysis, therefore, there would seem to be no reason for abandoning the present practice.

If, on the other hand, the rule is to be that a determination of which type of judgment is "just" and "appropriate" must be made on the basis of the facts and circumstances of each case, the present case is still one in which remand for a new trial was the only "just" and "appropriate" judgment which could have been rendered by the court below. Petitioner was tried for and convicted of income tax evasion, of which

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196. Connecticut: *State* v. *Newman*, 127 Conn. 398. Idaho: *State* v. *Bates*, 63 Idaho 119; *State* v. *Baker*, 60 Idaho 488. Illinois: *People* v. *Martin*, 380 Ill. 328; *People* v. *Yaunce*, 378 Ill. 307; *People* v. *Matter*, 378 Ill. 216; *People* v. *Bradley*, 375 Ill. 182; *People* v. *Samuels*, 366 Ill. 406; *People* v. *Buxton*, 362 Ill. 157. Missouri: *State* v. *DeMoss*, 338 Mo. 719. Montana: *State* v. *Thomas*, 46 Mont. 468. New York: *People* v. *Baldiseno*, 266 App. Div. 909; *People* v. *Romano*, 253 App. Div. 724, affirmed, 277 N. Y. 619; *People* v. *Conlin*, 256 App. Div. 847. Oklahoma: *Anderson* v. *State*, 76 Okla. Cr. 260. Pennsylvania: *Commonwealth* v. *Bird*, 152 Pa. Super. 648. Texas: *Adamson* v. *State*, 145 Tex. Cr. 570. Virginia: *Sutherland* v. *Commonwealth*, 171 Va. 485; *Charles* v. *Commonwealth*, 184 Va. 63.

the Government offered evidence on the "net worth-expenditures" theory of proof. The reversal of the conviction on appeal for insufficiency of the evidence was by two of the three judges who sat in the case, Judge McCord having entered a vigorous dissent. The majority agreed that the evidence clearly showed that petitioner spent considerably more money during the pertinent years than his reported gross incomes for those years and that his capital assets were increased each year in proportion to expenditures in excess of gross receipts (R. 226). The reversal was on the ground that the evidence relative to petitioner's net assets at the beginning of the period in question was insufficient. Such evidence had been offered through the testimony of E. J. Marquis, Jr., an auditor for the Bureau of Internal Revenue (R. 173–199), who could not say with certainty that his audit of petitioner's assets at the beginning of the period contained all of petitioner's assets. Because of that fact (R. 230), the majority below concluded that (R. 231):

> * * * evidence * * * did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.

The Government thought that the requirements of proof on the "net worth-expenditures" theory

of proof had been supplied and had good reason for so thinking. See *United States* v. *Johnson*, 319 U. S. 503, 517, and Judge McCord's dissenting opinion herein (R. 231–234). A possible formal error in the conduct of the trial was considered to be a not insubstantial barrier to consideration of the ruling below by this Court on certiorari.[19] But even if that ruling were to be accepted by the Government, the Court which made it, because of what it called a "defect in the evidence" (R. 236), did in fact remand the case for a new trial. Not only did the majority think that the defect might be supplied on another trial (R. 236), but, as Judge McCord stated in dissenting (R. 231), "The overwhelming weight of the evidence in this case points unerringly to the guilt of this defendant." The public interest demands enforcement of the criminal laws, not release of accused persons on technical grounds, particularly after a jury has rendered a verdict of guilty and thus considered the evidence against the accused sufficient to establish his guilt beyond a reasonable doubt. In all the circumstances, therefore, it would have been neither just nor

[19] As previously stated, fn. 2, *supra*, p. 7, one of the reasons why the Government did not petition for a writ of certiorari in the case was that one of the jurors had been excused by consent of counsel and the court but without written stipulation as required by a literal reading of Rule 23 (b) of the Federal Rules of Criminal Procedure (following 28 U. S. C., Sec. 687).

appropriate for the court below to have directed the entry of a judgment of acquittal and thereby set petitioner free and prevent the Government from establishing its case against him.

CONCLUSION

The action of the court below in remanding for a new trial was proper and should be affirmed.

Respectfully submitted,

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